

STATE OF MICHIGAN
COURT OF APPEALS

LOUIS FRANK REITMEYER,

Plaintiff-Appellee,

UNPUBLISHED
June 1, 2001

v

SCHULTZ EQUIPMENT & PARTS COMPANY,

Defendant-Appellant.

No. 226532
Iron Circuit Court
LC No. 96-005548-CK

Before: Sawyer, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Defendant Schultz Equipment & Parts Company appeals as of right the trial court's order granting plaintiff Louis Reitmeyer offer of judgment costs and attorney fee sanctions of \$10,500. We affirm.

I. Basic Facts And Procedural History

This is the second time this matter has been before this Court.¹ This breach of contract suit arose in 1996 when Reitmeyer sued Schultz Equipment and Michael Jauquet for fraud and misrepresentation for selling him a 1981 International Glider truck that they claimed was a 1989 Stake truck.² A mediation panel unanimously awarded Reitmeyer \$17,000 from Schultz Equipment,³ which Schultz Equipment accepted; Reitmeyer rejected the award by failing to accept it on time.⁴ Reitmeyer then made an offer of judgment of \$27,000.⁵ Schultz Equipment

¹ *Reitmeyer v Schultz Equipment*, 237 Mich App 332; 602 NW2d 596 (1999).

² *Id.* at 334.

³ Both Reitmeyer and Jauquet accepted the mediators' unanimous award of \$1,000 in Reitmeyer's favor, leading to Jauquet's stipulated dismissal from this action. *Id.* at 334, n 1.

⁴ *Id.*

⁵ *Id.*

did not accept this offer of judgment, but instead offered Reitmeyer \$18,000.⁶ When Reitmeyer did not accept Schultz Equipment's "counteroffer," the trial court scheduled the trial to commence August 19, 1997.⁷ On defendant's motion, the trial court adjourned trial until November 18, 1997.⁸ In the interim, the amendment of MCR 2.405(E) went into effect.⁹ A jury found in Reitmeyer's favor and the trial court entered judgment in his favor in the amount of \$27,013.¹⁰

Following trial, Reitmeyer moved for offer of judgment costs and attorney fee sanctions in the amount of \$10,689.45 under the unamended version of MCR 2.405(E).¹¹ The trial court denied Reitmeyer's motion, ruling that the amended version of MCR 2.405(E), which denied costs in cases submitted to mediation "unless the mediation award was *not unanimous*,"¹² to this case because the Supreme Court intended it to operate retrospectively.¹³

Reitmeyer challenged the trial court's ruling in its first appeal. This Court reversed, instructing the trial court that it should keep in mind whether applying an amended version of a court rule to a pending case worked an "injustice."¹⁴ To that end, this Court determined that the trial court in this case should consider several factors to determine whether applying the amended version of MCR 2.405 would work an injustice:

This determination should be based on the substance of the rule involved and the timing of plaintiff's actions, plaintiff's obvious gamesmanship or lack thereof, and thus plaintiff's reliance or lack of reliance on the rules as they existed at the time he made the pertinent decisions in this case, and any other pertinent factors in the individual case. We emphasize that while the results may be different between the old and new rule, as may ordinarily be expected, this is not the dispositive

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 334-335; see *id.* at 335, quoting the unamended version of MCR 2.405 in effect at the time this lawsuit was submitted to mediation:

Relationship to Mediation. In an action in which there has been both the rejection of a mediation award pursuant to MCR 2.403 and a rejection of an offer under this rule, the cost provisions of the rule under which the later rejection occurred control, except that if the same party would be entitled to costs under both rules costs may be recovered from the date of the earlier rejection.

¹² MCR 2.405(E) (emphasis added).

¹³ *Reitmeyer, supra* at 335.

¹⁴ *Id.* at 336.

factor in the analysis. Rather, we believe that several factors must be considered when determining the “injustice” in a particular case and whether a party “relied” on a court rule to the extent that it would be “unjust” to alter the rule in midstream.^{15]}

This Court then remanded the case to the trial court without retaining jurisdiction. On remand, the trial court applied the unamended version of MCR 2.405 in awarding the offer of judgment costs and attorney fee sanctions of \$10,500 to Reitmeyer. This appeal follows.

II. Unamended MCR 2.405

A. Standard Of Review

Defendants argue that, on remand, the trial court erred when it decided to apply the unamended version of MCR 2.405(E) to Reitmeyer’s motion for offer of judgment sanctions because it did not consider all the factors this Court identified in its previous opinion and because no injustice would result from applying the amended court rule. We review the trial court’s factual findings for clear error¹⁶ and its determination that the unamended version of MCR 2.405 applied in this case for an abuse of discretion.¹⁷

B. The Trial Court’s Application of MCR 2.405(E)

On remand, the parties made extensive arguments concerning which factors supported or contradicted applying the amended version versus the unamended version of MCR 2.405(E). The trial court then acknowledged those arguments and noted that this Court’s opinion established the law of the case with respect to the factors it could consider when determining which version of MCR 2.405(E) should apply. The trial court stated that it could not make a finding on the question of gamesmanship unless it could read the parties’ minds, evidently concluding that Reitmeyer’s actions did not definitively reveal an intent to use the offer of judgment rule to gain an advantage rather than merely secure a fair settlement. From the trial court’s perspective, applying the amended version of the court rule would be unjust “because all the actions were scheduled and were completed prior to the time that the court rule was amended” With respect to Reitmeyer’s reliance on the unamended court rule, the trial court again found that it was difficult to determine the extent to which he actually relied on it. However, the trial court impliedly found reliance when it noted that “it is only fair that the plaintiff be allowed to proceed under the court rule before the amendment as everything should have been completed, including the trial, before the amendment.”

The record supports the trial court’s findings on each of these factors, indicating that the trial court did not clearly err in making these findings. Further, given the way the trial court

¹⁵ *Id.* at 345.

¹⁶ MCR 2.613(C).

¹⁷ *Reitmeyer, supra* at 336.

weighed each factor, including its conclusion that the timing of the case was the most significant aspect of the case favoring application of the unamended court rule, we cannot say that it abused its discretion. Defendants' contention that the trial court did not apply the appropriate analysis is simply without merit. If they intend to argue that the trial court's discussion on the record of each factor was insufficient or that this Court's earlier opinion required the trial court to determine absolutely whether Reitmeyer was engaged in gamesmanship or relied on the old version of the court rule, they do not make any such arguments clearly. Nor would those arguments have merit. This Court's earlier opinion essentially asked the trial court to make findings on the available record of what occurred in the months of litigation leading up to the judgment it entered following the jury trial. The trial court carried out that task faithfully and honestly when it commented that the record did not permit a strong conclusion on gamesmanship or reliance. In short, we see no error requiring reversal in the trial court's factual findings, the analysis it used to reach its decision, or the decision it made.

III. Language In The Offer Of Judgment

A. Standard Of Review

Defendants argue that, because Reitmeyer referred to "Michigan statutes" rather than the "court rules" in his offer of judgment, he is not entitled to sanctions and costs on that offer, contrary to the trial court's conclusion that this error was harmless. We review a trial court's factfinding for clear error.¹⁸

B. Harmless Error

Reitmeyer's June 1997 offer of judgment plainly indicates that he made the offer of judgment "pursuant to Michigan Statutes," rather than the court rules. This was an error because the offer of judgment process from which he now has the right to costs and sanctions derives from MCR 2.405, not a statute. The trial court concluded that the error was harmless because "the defendant's counsel realized that the – that the offer of judgment was coming under the court rule [for] offer[s] of judgment."

We agree that the authority Schultz Equipment cites, *Beveridge v Shore Crest Lanes & Lounge*,¹⁹ can be read to require strict compliance with the court rules dealing with offers of judgment.²⁰ However, while good legal practice requires adequate citation to authority, such as a court rule, to support a legal proposition, the court rules do not require the party that makes an offer of judgment to cite MCR 2.405 in making an offer of judgment. Rather, MCR 2.405(A)²¹ defines an offer as "a written notification to an adverse party of the offeror's willingness to

¹⁸ MCR 2.613(C).

¹⁹ *Beveridge v Shorecrest Lanes & Lounge, Inc*, 204 Mich App 466; 516 NW2d 117 (1994).

²⁰ MCR 2.405.

²¹ This subsection was not amended.

stipulate to the entry of a judgment in a sum certain, which is deemed to include all costs and interest then accrued.” Reitmeyer’s June 1997 offer of judgment complied with this rule. The offer was in writing, sent to Schultz Equipment, which is an adverse party, indicating Reitmeyer’s willingness to stipulate to a judgment in the amount of a sum certain, which was \$27,000.

Furthermore, we could not agree with the trial court’s finding on this matter any more than we already do. Unlike the situation in *Beveridge*, in which the parties violated the substantive requirement to make a counteroffer within twenty-one days after an offer has been served,²² the error in this case is truly trivial. All the evidence in the trial court record indicates that it had absolutely no effect on Schultz Equipment’s ability to understand the offer of judgment and then defend against the motion for sanctions and costs. Clearly, from the references to MCR 2.405 in Schultz Equipment’s briefs and the motion hearing transcripts, both parties and the trial court knew that Reitmeyer was proceeding under MCR 2.405, not an unnamed statute. Our court rules clearly express a policy that not only favors affirming in the face of a harmless error, but requires such affirmance. For instance, MCR 2.613(A), entitled “Harmless Error,” states in relevant part:

[A]n error or defect in anything done or omitted by the court *or by the parties* is not grounds for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, *unless refusal to take this action appears to the court inconsistent with substantial justice.*^[23]

This harmless error rule mirrors the sentiment the Michigan Supreme Court expressed in MCR 1.105 in identifying the manner in which to interpret the court rules, which “are to be construed to secure the just, speedy, and economical determination of every action and to *avoid the consequences of error that does not affect the substantial rights of the parties.*”²⁴ Thus, while he made what might be considered a typographical error, Reitmeyer neither violated the court rules that controlled his offer of judgment nor prejudiced Schultz Equipment’s substantial rights, making this error harmless.

IV. Counteroffer

A. Standard Of Review

Schultz Equipment argues that the trial court erroneously determined that he sent a counteroffer to Reitmeyer when, in fact, he simply made another offer. Resolving this issue requires us to interpret and apply the court rules, which we do de novo.²⁵

²² *Beveridge*, *supra* at 469-470.

²³ Emphasis added.

²⁴ Emphasis added.

²⁵ *Grzesick v Cepela*, 237 Mich App 554, 559; 603 NW2d 809 (1999).

B. MCR 2.405(A)(2)

We agree with Schultz Equipment's analysis of its offer under the court rule,²⁶ but do not agree that it merits relief. MCR 2.405(A)(2), which has not been amended, defines a counteroffer as "a written reply to an offer, served within 21 days after service of the offer, in which a party rejects an offer of the adverse party *and* makes his or her own offer."²⁷ The language of this court rule is unambiguous and, therefore, does not require additional interpretation.²⁸ Under the plain language of MCR 2.405(A)(2), Schultz Equipment's offer of judgment is just what it is entitled, an "Offer of Judgment," not a counteroffer. In that written offer, there is no indication that Schultz Equipment had received Reitmeyer's offer of judgment and was replying to it, much less that it was rejecting that original offer. For all we know, these two offers of judgment, though they were sent within twenty-one days of each other, simply crossed in the mail. The net effect of this situation is, as in *Beveridge*,²⁹ there were two offers and no counteroffers, making each party's average offer³⁰ relevant to determining costs and sanctions under MCR 2.405(D).

Consequently, for Reitmeyer to recover offer of judgment costs, the judgment entered in his favor had to exceed the \$27,000 he offered to Schultz Equipment in his June 20, 1997, written offer of judgment.³¹ For Schultz Equipment to recover offer of judgment costs, the judgment entered in Reitmeyer's favor had to be less than \$18,000, the amount it offered in

²⁶ Though the previous opinion this Court issued in this case referred to Schultz Equipment's "counteroffer," *Reitmeyer, supra* at 334, it did so in what appears to us to be a nontechnical sense. Moreover, whether the June 26, 1997, offer of judgment Schultz Equipment sent Reitmeyer was not challenged in that appeal or central to this Court's disposition of the appeal. That earlier panel had no cause, as we do, to determine if Schultz Equipment's offer of judgment was a counteroffer within the meaning of MCR 2.405(A)(2). Thus, this Court is not barred under the doctrines of collateral estoppel or law of the case from determining this issue. See *Nummer v Dep't of Treasury*, 448 Mich 534, 541-542; 533 NW2d 250 (1995) (for collateral estoppel doctrine to preclude litigating issue in instant appeal, the issue had to be actually litigated previously and essential to the determination of the previous case in addition to other factors); *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981) ("The law of the case doctrine dispenses with the need for this Court to again consider legal questions *determined by our prior decision and necessary to it*. [T]he doctrine is that if an appellate court has passed on a legal question and remanded the case for further proceedings, the *legal question thus determined* by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.) (emphasis added).

²⁷ Emphasis added.

²⁸ See *In re Juvenile Commitment Costs*, 240 Mich App 420, 427; 613 NW2d 348 (2000).

²⁹ *Beveridge, supra* at 470.

³⁰ See MCR 2.405(A)(3) ("Average offer" means the sum of an offer and a counteroffer, divided by two. *If no counteroffer is made, the offer shall be used as the average offer.*") (emphasis added).

³¹ See MCR 2.405(D)(1).

writing to Reitmeyer on June 26, 1997.³² The trial court entered judgment in favor of Reitmeyer in the amount of \$27,013, just slightly more than the amount Reitmeyer had offered. Critically, Schultz Equipment does not attempt to explain why, even though we agree that it made an offer rather than a counteroffer, it is entitled to any relief at all. Thus, we conclude that Reitmeyer, under the plain meaning of the court rule, is entitled to offer of judgment costs.

Affirmed.

/s/ David H. Sawyer

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

³² See MCR 2.405(D)(2).